Editor's note: Erratum dated June 5, 2001, See 155 IBLA 97A below.

PEABODY COAL CO.

IBLA 97-572 Decided May 18, 2001

Appeal from a decision of the Acting Deputy Commissioner of Indian Affairs, Bureau of Indian Affairs, affirming a Minerals Management Service demand letter requiring payment of late payment charges for additional royalties due on coal produced and sold from an Indian coal mining lease. MMS-93-0724-IND (Coal Mining Lease Contract No. 14-20-0603-9910).

Affirmed in part and reversed in part.

1. Coal Leases and Permits: Royalties--Indians: Mineral Resources: Mining: Royalties

Where the lessee of an Indian coal lease fails to pay additional royalty resulting from an increase in the cost-based sales price it received for production owing to royalty readjustment of a related lease, MMS is entitled to assess late payment charges. Such charges are properly computed from the date of readjustment to the date that the lessee made a lump-sum payment of that royalty. The fact that the readjustment was appealed and the appeal was later settled, resulting in less of an increase in the sales price, does not alter the fact that additional royalty became due each month following the month of production for the subject lease. Failure to pay properly results in the assessment of late payment charges.

APPEARANCES: Brian E. McGee, Esq., Denver, Colorado, for Appellant; Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Peabody Coal Company (Peabody) has appealed from the April 29, 1997, decision of Acting Deputy Commissioner of Indian Affairs, Bureau of Indian Affairs (BIA), affirming a September 13, 1993, demand letter of the Acting Area Manager, State and Indian Program Audit Office, Royalty Management Program, Minerals Management Service (MMS). MMS had required Peabody to pay late payment (or interest) charges in the total amount of $95,215.68 for additional royalties on coal produced under an Indian coal mining lease from February 1984 through November 1987.

Coal Mining Lease Contract No. 14-20-0603-9910 (Navajo JU Lease 9910) is directly at issue herein. However, Coal Mining Lease Contract No. 14-20-0603-8580 (Navajo Lease 8580) and Coal Mining Lease Contract No. 14-20-0450-5743 (Hopi JU Lease 5743) also directly bear on the disposition of this matter. Accordingly, it is appropriate to review the history of all three leases.

Navajo Lease 8580 was issued by the Navajo Tribe (the Navajo) to Sentry Royalty Co. (Sentry), Peabody's predecessor-in-interest, on February 1, 1964. (Statement of Reasons for Appeal (SOR) at 4 and Ex. A.) It covers a 24,858-acre tract in the Navajo Indian Reservation and originally provided for a sliding cents-per-ton royalty. (SOR Ex. A at 4.) 1/

Navajo JU Lease 9910 was issued by the Navajo to Sentry on June 6, 1966. (SOR at 4-5 and Ex. C.) It covers approximately 40,000 acres (known as the "joint use area") that are jointly owned by the Navajo and the Hopi Tribe (the Hopi). 2/ It ostensibly originally provided for an effective off-reservation coal royalty of 6.67 percent of the monthly gross realization, but in no event less than 25¢ per ton, and an effective on-reservation coal royalty of 5.33 percent of the monthly gross realization, but in no event less than 20¢ per ton. 3/ (SOR Ex. C at 4-5.)

Hopi JU Lease 5743 was also issued by the Hopi to Sentry on June 6, 1966, for the joint use area. It originally provided for an effective off-reservation coal royalty of 3.335 percent of the monthly gross realization, but in no event less than 12.5¢ per ton, and an effective on-reservation

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1/ The royalty rate was 37.5¢ per ton "for all coal sold and utilized off the Navajo Reservation, and [30¢] per ton for all coal sold and utilized on the Navajo Reservation." The lease provided that those rates would apply "whenever the average monthly gross realization therefrom is [$5.00] or more per ton." Lower rates were established when monthly gross realization was less that $4.00 per ton and when it was more than $4.00 but less than $5.00 per ton. The lease was amended on Apr. 1, 1964, but the royalty provisions were not altered. (SOR at 4 and Ex. B.)

2/ The Executive Order of Dec. 16, 1882, established what is called the "joint use area" between the Navajo and Hopi. See Santa Fe Pacific Railroad, 90 IBLA 200, 202 (1986). The "JU" in the lease numbers employed herein refers to the fact that the lease is for the Navajo-Hopi joint use area.

3/ The term "gross realization" is defined as "the gross sales price at the mining site, without any deduction therefrom of overhead sales costs or any other business expense." (SOR Ex. C at 5.) The "off-reservation" and "on-reservation" royalty terms evidently applied to coal that was used either "off" or "on" the joint use area, respectively.

There is some confusion in the record as to the original royalty rate. Although the lease states otherwise, Peabody states that the royalty rental rate was 3.335 percent and the minimum royalty was as 10¢ per ton. (SOR at 5.) It is unnecessary to resolve this question in the context of the present appeal, as the terms were subsequently revised.

coal royalty of 2.665 percent of the monthly gross realization, but in no event less than 10¢ per ton. (SOR at 5-6 and Ex. D at 5.)

Coal leased under all three leases is mined by Peabody at its Black Mesa and Kayenta Mines. The Black Mesa Mine supplies coal to the Mohave Project Generating Station; the Kayenta Mine supplies coal to the Navajo Generating Station. 4/ (SOR at 6.) Peabody sells coal to participants in the Mohave Project pursuant to a long-term coal supply agreement dating back to January 6, 1967; it sells coal to the operator of the Navajo Generating Station pursuant to a long-term coal supply agreement dating back to June 1, 1970. (SOR at 6-7.) Those supply agreements were amended in May 1976 and February 1977, respectively, to establish a "pass-through" arrangement whereby the purchasers of the coal reimburse Peabody for royalty paid to the Indian lessors (among other so-called "mine price adjustments"). (SOR at 7-8.) See Peabody Coal Co., 72 IBLA 337, 339 (1983).

On June 18, 1984, the Navajo Area Director, BIA, issued a letter notifying Peabody that he was adjusting the royalty rate on coal mined under Navajo Lease 8580 to "20.0 percent of the gross value of the coal mined as determined by the Federal formula under 43 C.F.R. 3473.3-2(2) and 3485.2f." (SOR at 8-9 and Ex. G.) Peabody appealed BIA's letter.

During the pendency of the appeal, Peabody continued to pay production royalty to the Navajo at the 30¢/37.5¢ rate specified in the original Navajo Lease 8580. 5/ (SOR at 9.) Peabody, the Navajo, and the Department participated in negotiations concerning amendment of Navajo Lease 8580, including readjustment of royalty provisions. An agreement was reached that vacated BIA's 20 percent royalty rate adjustment 6/ and established instead royalty rate adjustments arising from contractual amendments both to Navajo Lease 8580 and to Navajo JU Lease 9910. (SOR at 10-11 and Ex. H.) As part of that agreement, Peabody's appeal was settled. The effective date of those amendments was December 14, 1987.

The amendments to Navajo Lease 8580 specified that for the period from February 1, 1984, until December 14, 1987, Peabody was to "pay a royalty of 12.5 percent of the gross realization received for such coal

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4/ Coal is transported to the Mohave Generating Station, which is located off reservation lands, by a slurry pipeline operated by Black Mesa Pipeline, Inc. Coal is transported to the Navajo Generating Station, which is located on the Navajo reservation near Page, Arizona, by private railroad.

5/ Peabody states that participants in the Mohave Project and Navajo Station Supply Agreements refused to reimburse Peabody as a pass-through for royalty at the increased 20.0 percent rate.

6/ The decision was formally vacated by the Acting Assistant Secretary, Indian Affairs, at the direction of the Secretary of the Interior, on Dec. 18, 1987.

'due and payable within ten (10) calendar days of the effective date"' of the amendments. (SOR at 10-11.) The Navajo agreed "not to assert any claim or other demand for any amounts as past due royalty under this Lease for the period February 1, 1984, to the effective date of the these lease amendments," December 14, 1987, "or interest thereon." (SOR at 11 and Ex. H.) That additional royalty was due by December 24, 1987. (SOR at 17.)

Following issuance of the June 1984 BIA letter, Peabody apparently continued to value production from Navajo JU Lease 9910 (and Hopi JU Lease 5743) using the 30¢/37.5¢ rate specified in Navajo Lease 8580. In any event, it is clear that production for Navajo JU Lease 9910 (and Hopi JU Lease 5743) was not valued using the 20 percent royalty rate imposed by BIA in June 1984.

In the December 1987 settlement, the parties agreed to amend the prevailing royalty rate under Navajo JU Lease 9910. According to Peabody,

> the royalty rate was increased, effective December 14, 1987, from 2.665 percent/3.335 percent to 6.25 percent [7/] of the monthly gross realization for all coal obtained from the leased premises, "computed based on F.O.B. mines," and a 10-year lease readjustment was inserted. These Amendments to [Navajo JU Lease 9910] did not include any provision with respect to the payment of additional royalty by Peabody to the Navajo Tribe during the period from February 1, 1984, to the effective date of the Amendments to [Navajo JU Lease 9910], or December 14, 1987.

(SOR at 11 and Ex. I (emphasis supplied).)

The parties also agreed to amend Hopi JU Lease 5743 to establish a royalty rate identical to that under Navajo JU Lease 9910: "Among other matters, the royalty rate was increased effective December 14, 1987, from 2.665 percent/3.335 percent to 6.25 percent of the monthly gross realization for all coal obtained from the lease lands * * * ." Further, as with Navajo JU Lease 9910, the amendments to Hopi JU Lease 5743 "did not include any provision with respect to the payment of additional royalty by Peabody to the Hopi Tribe during the period from February 1, 1984," to December 14, 1987, "the effective date of the amendments." (SOR at 12, 16-17.)

In sum, from June 1984 to December 1987, Peabody continued to value for royalty purposes coal produced from all three leases as it did prior

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7/ As noted above, it appears from the record submitted on appeal that, for the Navajo joint use area lease, the original royalty rate was 6.67 percent and the minimum royalty was 20¢ per ton. See n.3.

The royalty is set at 6.25 percent on Navajo JU Lease 9910 and Hopi JU Lease 5743 because it is divided equally between the Navajo and the Hopi. Since both tribes are paid at the rate of 6.25 percent, a total royalty of 12.5 percent is paid, the equivalent of that due under Navajo Lease 8580.

to the issuance of BIA's June 1984 letter. The December 1987 amendments increased the amount of royalty that Peabody was required to pay to the Navajo for coal sold from lands covered by Navajo Lease 8580 from February 1, 1984, through December 14, 1987, and the parties expressly addressed how to treat royalty that came due during that period. The December 1987 amendments increased the royalty rate that Peabody was required to pay to the Navajo for coal sold from lands covered by Navajo JU Lease 9910 and Hopi JU Lease 5743, but no provision was made concerning payment of royalty due from February 1, 1984, to December 14, 1987.

On December 15, 1987, Peabody billed the purchasers under its supply contracts for the increased production royalty (including royalty on royalty) incurred pursuant to the amendments to Navajo Lease 8580 for the February 1984 through November 1987 period. (SOR at 17-18 and Exs. P, Q, and R.) Those amounts were duly paid to Peabody pursuant to the pass-through provision. (SOR at 19.) On December 24, 1987, Peabody tendered a $41,389,468.71 payment to BIA for additional royalty (including royalty on the reimbursement for royalty paid) for coal sold from lands covered by Navajo Lease 8580. (SOR at 19 and Ex. S.)

The royalty calculations for Navajo Lease 8580 are central to the royalty calculation for Navajo JU Lease 9910, which is at issue here, as well as for Hopi JU Lease 5743. This is because the value of the coal for royalty purposes is determined by the amount received by the lessee when it is sold, including reimbursements for expenses that are passed through to the purchasers. See generally Peabody Coal Co., 72 IBLA at 340-42. As noted above, the purchasers of the coal agreed to reimburse the lessee (Peabody) for royalty and other expenses. That reimbursement added to the value of the coal. Significantly, since the coal produced under all three leases was commingled and then sold, the value of the coal from all three leases is established by the highest price received for the coal, that is, on the highest single mine price paid. (MMS Answer at 2.) The single mine price paid was in turn (under the applicable agreement) based on the highest of the production costs incurred by Peabody, including the highest royalty paid by Peabody on the sale of coal from any of the leases.

In this case, the highest royalty was paid by Peabody under Navajo Lease 8580. Accordingly, when the royalties paid under Navajo Lease 8580 increased, the price paid for the production from Navajo JU Lease 9910 (and Hopi JU Lease 5743) also increased by like amount, increasing in turn the value of the production on those leases for royalty purposes. See SOR at 15-16; MMS Answer at 2-3. The value of the coal for royalty purposes was thus the same for all leases. However, as discussed above, the royalty rate for the leases was different (6.25 percent for Navajo JU Lease 9910 and Hopi JU Lease 5743, and 12.5 percent for Navajo Lease 8580). 8/

8/ The royalty rate for Navajo Lease 8580 was ostensibly 20 percent from June 18, 1984, until Dec. 14, 1987.

Accordingly, on January 11, 1988, Peabody billed the purchasers of coal from Navajo JU Lease 9910 and Hopi JU Lease 5743 for additional royalty for coal they had purchased from Peabody from February 1984 through November 1987, pursuant to the pass-through provisions of their supply agreements. (SOR at 19-20 and Ex. T and U.) The total amount of additional royalty for Navajo JU Lease 9910 (to include royalty on the passed-through royalty) was $619,190.88. (SOR at 20-21.) On January 15, 1988, Peabody submitted that amount to BIA as additional royalty owed to the Navajo on Lease 9910. 9/ (SOR at 21 and Ex. V.) Peabody included with that payment an MMS Form MMS-4014 and Lease Report for Sales Data and Product Code stating the "adjustment reason code" as Code 38. (SOR at 21.)

In its September 1993 demand letter, MMS required Peabody to pay late payment charges of $95,215.68 owing to the recalculation and payment of additional royalties on coal produced and sold from Navajo JU Lease 9910 from February 1984 through November 1987. The demand letter cites Article IIIa. of Navajo JU Lease 9910, which provides: "All royalties accruing for any month shall be due and payable on or before the twenty-fifth on the succeeding month." It concludes that, "[c]onsequently, for those royalties paid in January 1988 for sales months February 1984 through November 1987, late payment charges are applicable to" the lease. MMS required payment by Peabody of the late payment charges within 30 days of its receipt of the demand letter, stating that the failure to pay might subject Peabody to civil penalties.

Peabody appealed to the Commissioner of Indian Affairs from MMS' September 1993 demand letter, pursuant to 30 C.F.R. Part 290. It also submitted a surety bond, in order to guarantee payment of the late payment charges. On appeal, Peabody challenged MMS' requirement to pay any late payment charges because it believed that there had been no failure to pay royalty when it became due. Rather, Peabody argued that the obligation to pay additional royalty only arose when Navajo Lease 8580 was amended, with the approval of the Secretary, effective December 14, 1987. It noted that, once the obligation arose, it promptly and timely paid the additional royalty then found to be due. Thus, Peabody asserted that there had been no late payment of royalty which would entitle MMS to assess late payment charges. Moreover, Peabody argued that the waiver of "interest" by the Navajo, set forth in the December 1987 amendment, was applicable to the payment of additional royalties found to be due, by reason of the amendment, under both Navajo Lease 8580 and Navajo JU Lease 9910.

In his April 1997 decision, the Acting Deputy Commissioner upheld MMS' determination that, despite the fact that additional royalties for coal produced and sold from Navajo JU Lease 9910, during the period from February 1984 through November 1987, were not recalculated and paid until January 1988, they had become due starting in March 1984 and continuing through December 1987:

9/ Peabody also paid an identical amount to the Hopi as additional royalty due under Hopi JU Lease 5743. (SOR at 21 and Ex. W.)

> [MMS] concluded correctly that * * * the additional royalties were accrued for the production months of February 1984 through November 1987 and[,] in accordance with the lease terms, were deemed "due" for these purposes on or before the twenty-fifth of each succeeding month. While the retroactive royalties at issue here accrued in December 1987, they indisputably accrued for the months of production and were due and payable in each succeeding month.

(Decision at 5-6.) He thus affirmed MMS' September 1993 demand letter, requiring Peabody to pay late payment charges for the entire period of time that additional royalties had been deemed to be owed for coal produced and sold from Navajo JU Lease 9910, until the royalties were finally paid in January 1988.

The Acting Deputy Commissioner also ruled that the waiver of any claim to "interest" by the Navajo applied by its terms only to the additional royalties calculated and paid on Navajo Lease 8580. Accordingly, he declined to extend it to additional royalties calculated and paid for Navajo JU Lease 9910. The Acting Deputy Commissioner affirmed MMS' September 1993 demand letter requiring the payment of late payment charges "in all respects," thus denying Peabody's appeal. (Decision at 7.) Peabody appealed timely to this Board from the Acting Deputy Commissioner's April 1997 decision, contending that the decision is contrary to the law and facts.

[1] During the time period at issue here, the Department was required by 30 C.F.R. § 218.202 (1987) (formerly 30 C.F.R. § 218.200 (1984)) to assess late payment charges when royalties owed on the production and sale of coal from Indian coal mining leases are not paid by the date they are due. Peabody Coal Co., 72 IBLA at 348. That regulation specifically provided:

> (a) The failure to make timely or proper payment of any monies due pursuant to leases * * * subject to these rules will result in the collection by MMS of the full amount past due plus a late payment charge. * * * However, late payment charges assessed with respect to any Indian lease * * * shall be collected and paid to the * * * tribe to which the amount overdue is owed.
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> (b) Late payment charges are assessed on any late payment or underpayment from the date that the payment was due until the date on which the payment is received in the appropriate MMS accounting office * * *.
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> (e) Late payment charges apply to all underpayments and payments received after the due date. These charges include production * * * royalties * * * or any other payments * * * that an operator/lessee is required to pay by a specified date.

30 C.F.R. § 218.202 (1987) (emphasis added).

As explained above, the increase in royalty on Navajo Lease 8580 not only resulted in an increase in Peabody's royalty and assessment of late payment charges against it for Navajo JU Lease 9910, but also for Hopi JU Lease 5743. It appears that, since the Navajo and Hopi own equal undivided interests in coal produced from the joint use area, Peabody owed each of them an identical amount in additional royalties and (if properly found to be owing) an identical amount in late payment charges as well, since Peabody made the royalty payments to them at the same time.

Peabody appealed the assessment of late payment charges on Hopi JU Lease 5743 to the MMS Directorate, just as it did concerning those assessed on Navajo JU Lease 9910 and at issue here. However, instead of the Acting Deputy Commissioner issuing a decision (as he did in the instant case), the Assistant Secretary for Indian Affairs issued a decision affirming a similar MMS order requiring Peabody to pay late payment charges in the amount of $95,215.68 to the Hopi. That decision was considered final for the Department and therefore subject to immediate judicial review. Peabody accordingly filed an action in the United States District Court for the District of Arizona seeking judicial review of the Assistant Secretary's decision assessing late payment charges under Hopi JU Lease 5743 for the period from June 18, 1984, through November 1987. Peabody Western Coal Co. v. Babbitt, CIV No. 98-0023 PCT EHC.

On September 3, 1999, the District Court entered its memorandum and order in the matter denying in large part Peabody's motion for summary judgment while granting in large part the Department's, effectively affirming the imposition of late payment charges against Peabody for the manner in which it paid additional royalty on Hopi JU Lease 5743. The District Court affirmed MMS' assessment of late payment charges against Peabody for payments of royalty for most of the time in question:

> The regulatory provision for assessing late payment charges on untimely royalty payments is 30 C.F.R. § 218.202. * * *
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> Assessments for late payments are not meant to penalize the lessee, but rather are intended to compensate the lessor for the time value of money owed but not paid. Coastal Oil and Gas Corp., 108 IBLA 62, 67 (1989); Peabody Coal Co./Hopi Tribe, 72 IBLA 337, 348 (1983); Atlantic Richfield Co., 21 IBLA 337 (1983).
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> The assessment of late payment charges has its genesis in the Royalty Readjustment letter of June 18, 1984. Consistent with the terms of Navajo Lease 8580, the DOI notified Peabody that it was adjusting the royalty rate in Navajo Lease 8580 to an ad valorem basis. Peabody appealed this readjustment. In doing so, Peabody knew that it would be liable for late payment charges if its appeal was unsuccessful, or if the adjusted royalty rate was greater than the pre-adjustment rate.

Although the appeal was eventually dismissed, the negotiated royalty rate under Navajo Lease 8580 was greater than $0.30/$0.375 per ton. The negotiated royalty rate was 12.5 percent of gross realization. The amendments to Navajo Lease 8580 also provided for the retroactive payment of royalties at the increased rate beginning with February 1984. The dispositive question[] in this case is the effect, if any, of this increased royalty rate and the retroactive payment of royalties on Hopi [JU] Lease 5743.

To answer these questions, it is necessary to understand what would have happened (1) had Peabody not negotiated a new royalty rate and (2) its appeal of the Royalty Readjustment Letter was not successful. Had Peabody been unsuccessful in its appeal, the new royalty rate would have been 20.0 percent of the gross value of the coal mined. Moreover, this new royalty rate would have been retroactive to June 18, 1984 (the date of the Royalty Readjustment Letter), and Peabody would have been liable for late charges under Navajo Lease 8580, because its appeal of the readjustment letter delayed the payment of royalties at the increased rate.

These retroactive royalty payments also would have increased mine prices to the extent of the additional royalties, resulting in an attendant increase in royalties due under Hopi [JU] Lease 5743.[2] The same reason for imposing a late payment charge under Navajo Lease 8580 justifies imposing a late payment charge under Hopi [JU] Lease 5743. Peabody would have been obligated to pay increased royalties under Hopi [JU] Lease 5743 as of June 18, 1984. The appeal simply delayed payment of the additional royalties which were due under the Hopi Lease as a result of the increased royalty rate of Navajo Lease 8580.

Negotiation of an adjusted royalty rate does not alter this outcome, because Peabody would still be liable for additional royalties under Hopi [JU] Lease 5743 as a consequence of the increased royalty rate under Navajo Lease 8580. The appeal was dismissed and [BIA's June 18, 1984,] Royalty

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[2]Peabody aptly explains this principle in its memorandum in support of motion for summary judgment: "If the royalty payment under Navajo Lease 8580 is adjusted upward for a given month, the mine price calculated for that month also increases to reflect this additional royalty cost. Such an increase in a respective mine price then leads to additional royalty becoming due under the ad valorem royalty provisions of Navajo JU Lease 9910 and Hopi JU Lease 5743."

Readjustment Review Letter [was] vacated solely because Peabody agreed to an increased royalty rate.

To the extent that the decision reached by DOI upholds late payment charges for June 18, 1984 through November 1987, it is also consistent with the agency's decision in Bear Coal Co., 136 IBLA 59 (1996).[3] The Court finds that the assessment of late payment charges under Hopi [JU] Lease 5743 for the period from June 18, 1984 through November 1987 was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The fact that the Royalty Readjustment Letter was eventually vacated does not change this result, because it was vacated only after Peabody entered into a negotiated amendment of Navajo Lease 8580. Peabody knew that some adjustment in the royalty rate was likely and that it would pay the minimum adjusted rate. The final negotiated royalty rate was still greater than the pre-adjustment rate and resulted in an increase in mine prices, which, in turn, increased the royalties due under the Hopi Lease. The fact that Peabody eventually settled this dispute, rather than continue its appeal, does not absolve Peabody from its obligation to compensate the Hopi Tribe for the time value of that money.

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[3]The Bear Coal Co. decision upheld the assessment of a late payment charge pursuant to 30 C.F.R. § 218.202(a). The DOI held that by continuing to pay the pre-adjusted rate during the pendency of its appeal of the rate adjustment, Bear underpaid royalties and was therefore liable for late payment charges.

Peabody Western Coal Co. v. Babbitt, CIV No. 98-0023 PCT EHC (Memorandum and Order, Sept. 3, 1999, at 10-13.)

The facts considered by the District Court are virtually identical to the facts presented in the instant appeal. In both cases, an increase in royalty due on Navajo Lease 8580 resulted in an increase in royalty due on a second lease (Hopi JU Lease 5743 in Peabody Western and Navajo JU Lease 9910 in the instant matter). Peabody was the lessee in both cases and therefore knew about the increase in royalty on Navajo Lease 8580 and that it would affect the royalty due on the second lease. In both cases there was a settlement agreement between Peabody and the Indian lessor (the Navajo) that did not address the terms of the second lease.

As Peabody points out, the standard of review before the Court was whether the Assistant Secretary's decision to impose late payment charges was arbitrary and capricious, so that the Court must afford great deference to MMS' decision. Although that is not the applicable standard of review before this Board, we note that the Court's order demonstrates that it made a thorough review of the law, including the precedent of this Board, in

affirming MMS. As the facts, issues, and parties are virtually identical, we consider the District Court's decision to be binding precedent in the instant case. Although Peabody notes that it "does not agree with the District Court holding" and describes numerous perceived faults in it, it does not indicate that the decision has been appealed.

In any event, we are in full agreement with the District Court's view of the merits. Peabody argues that the increase in the royalties hinged entirely on the December 1987 amendment of Navajo Lease 8580, and that no additional royalties were due until that amendment occurred. It asserts that its obligation to pay additional royalties did not arise until January 1988 when it requested the higher sales price from its purchasers, and that it had until the next month to pay. See SOR at 32-33, 59-60. Peabody concludes accordingly that its January 15, 1988, payment was timely. We disagree.

Paragraph E of Article III of Navajo JU Lease 9910 provides: "All royalties accruing for any month shall be due and payable on or before the twenty-fifth of the succeeding month." Lease at 6. It is the failure to pay royalties when they become "due" which justifies MMS in assessing late payment charges. See 30 C.F.R. § 218.202(b) (1987). We accordingly must decide when the additional royalties "accru[ed]" within the meaning of Paragraph E. Royalty "accrues" at the time of production:

> [R]oyalties are not due on "value" or even "market value" in the abstract, but only on the value of production saved, removed or sold from the leased property. Likewise, the agency's regulations do not refer to "gross proceeds" in the abstract, but only to gross proceeds that accrue to the lessee from the disposition or sale of produced substances, that is, gas actually removed and delivered to the pipeline. Consequently, royalties are not owed unless and until actual production, the severance of minerals from the formation, occurs. Diamond Shamrock [Exploration Co. v. Hodel, 853 F.2d 1159, 1165 (5th Cir. 1988)].

Murphy Exploration and Production Co., 148 IBLA 266, 272-73 (1999) (footnote omitted). The royalty right "accrued" to the Navajo upon the severance of the coal from the ground. Under the sales contract, royalty was "due" the next month following production. Failure to pay royalty in the correct amount when due results in the assessment of late payment charges. See 30 C.F.R. § 218.202(b) (1987).

Peabody cannot argue that it first learned that additional royalty was due when the settlement was approved in December 1987. BIA had raised the royalty to 20 percent during the period from June 1984 through November 1987. The fact that BIA's June 1984 notice was eventually vacated does not detract from the fact that Peabody was on notice that royalty would increase. We held as follows in Peabody Coal Co., in upholding the assessment of late payment charges owing to a failure to pay additional royalties during the pendency of an appeal challenging the Department's requirement to pay such royalties:

> The imposition of late payment charges is appropriate to compensate [the Navajo and the Hopi] for the loss of use of funds due but not paid, even where the lessee pursues a bona fide appeal of the underlying [royalty] determination instead of paying the demanded amount. Atlantic Richfield Co., [21 IBLA 98, 108, 82 I.D. 316, 321 (1975)]. The lessee is protected from overpayment where the late payment charges are recalculated after final Departmental action [on the appeal] to correspond to the [royalty] amount ultimately found to be due.

72 IBLA at 348 (see also discussion at 339-40). Further, in Bear Coal Co., 136 IBLA 59, 63-64 (1996), we rejected the argument that the lessee was not required to pay additional royalties during the pendency of its appeal from a Departmental decision increasing the royalty rate, since to do so "would have the effect of allowing individual appeals or the administrative process to determine due dates for royalties due the United States." Utah International, Inc., 107 IBLA 217, 218-19, 221-22 (1989) (accord, Peabody Western Coal Co. v. Babbitt, supra at 10-13); see also Solid Minerals Payor Handbook (September 1984) at 6.3-6 ("[R]oyalty adjustments to MMS may not await settlement of litigation or other non-routine matters").

Peabody knew or should have known at the time of issuance of BIA's June 1984 notice increasing royalty due on Navajo Lease 8580 to 20 percent that such increase would (unless modified) also have the effect of increasing the royalty payable for production under Navajo JU Lease 9910. Peabody could have paid the additional royalty under protest pending review of its appeal of BIA's June 1984 royalty readjustment. If it prevailed, Peabody could have sought a refund of all of the excess royalties paid; 10/ if not, Peabody would have avoided late payment charges. 11/ See Atlantic

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10/ Unlike for off-shore leases, there is no statute of limitations for seeking such refunds for Indian leases. Peabody could presumably have offset its previous overpayment against its then current royalty obligation. See MMS 1984 Payor Handbook (Solid Minerals) at 3.1-5; 5.1-5; compare 30 C.F.R. § 218.203.

11/ We held as follows in Atlantic Richfield Co., supra:

"Appellant's posture that the time consumed in obtaining appellate administrative decisions and court review makes inequitable the demand for prejudgment interest overlooks a cogent consideration. Sinclair could have paid promptly the money for additional royalties demanded by the Supervisor on November 22, 1961, accompanied by a protest against such imposition. It chose not to do so, despite the clearly enunciated holdings in Richfield in 1955. Thus it appears that appellant (and its predecessor in interest) chose to utilize the funds rather than pay them to the United States, based on the hope that the reasoned administrative interpretation of 30 U.S.C. § 226(c) (1946) could be successfully challenged. It seems equitable that the United States should be recompensed for the loss of the use of the funds due it."

Id. at 108, 82 I.D. at 320-21 (footnote omitted). The Navajo stand in the posture of the United States in this matter.

Richfield Co., 21 IBLA at 108, 82 I.D. at 320-21. Peabody did not take such action. 12/

Peabody also argues that no late payment charges can be charged because no demand letter was issued requiring payment of the additional royalties owed for Navajo JU Lease 9910, so that no due date for payment was established from which date late payment charges would accrue. (SOR at 82-94.) The obligation to pay higher royalties on that lease starting in 1984 occurred automatically by operation of the outstanding long-term coal supply agreements and that lease. No action by MMS was required. See Utah International, Inc., 107 IBLA at 218-19, 221-22; Cyprus Western Coal Co., 103 IBLA 278, 279-80, 284-85 (1988). 13/ The fact that, in settling the appeal from BIA's June 1984 notice, the Department ultimately established a due date (December 24, 1987) for Navajo Lease 8580 does not mean that it was required to do likewise for Navajo JU Lease 9910.

This case is very much like Oxy USA Inc., 125 IBLA 308 (1993), where the obligation to pay additional royalties arose as a consequence of a retroactive price adjustment which increased the sales price owed for oil and gas production from a Federal lease during an earlier time period. Id. at 308-09. Although all of the additional royalty was paid within 30 days of receipt of the additional sales proceeds from the purchaser, the Board concluded that this royalty accrued at the time of production and that

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12/ Peabody refers to provisions of MMS' September 1984 Solid Minerals Payor Handbook (1984 Handbook) pertaining to the recalculation and payment of royalties for coal where there has been a "retroactive price adjustment" attributable to a price factor or factors that, for reasons beyond the payor's control, become known after coal has been sold and royalty paid. The 1984 Handbook authorizes, but does not require, MMS to waive late payment charges. (1984 Handbook at 5.1-2.) As set out above, Peabody believes that it could not have known that additional royalty would become due until after it had negotiated a royalty rate adjustment. Accordingly, it believes it should receive a waiver.

The royalty rate has been "known" to Peabody at all relevant times. The initial rate was set forth in the lease. When a higher rate was announced in BIA's June 1984 royalty adjustment notice, Peabody appealed that notice and ultimately negotiated a more favorable rate. However, it was plainly on notice a new rate as high as 20 percent could prevail. Peabody thus possessed the information necessary to calculate monthly price and royalty, and its case is not one where "price, quantity and/or royalty rate are not known until after the time of royalty determination." Nor is this a case like those noted in the 1984 Handbook where lead/zinc prices are not finally established until after initial royalty determination.

13/ We find nothing in Atlantic Richfield Co., supra, and Peabody Coal Co., 72 IBLA 337 (1983), cited by Peabody, to the contrary, since, in each of those cases, the demand letter itself was necessary to fix the additional royalties due for past time periods. See 72 IBLA at 339-40, 348; 21 IBLA at 101 n.1, 102-04, 108, 111, 82 I.D. at 317 n.1, 317-18, 320-21, 322.

payment was due by the end of the month following the month of production under 30 C.F.R. § 218.50(a) in the absence of any regulatory exception thereto. We held accordingly that the additional royalty payment was late, since it was received after the end of each month following the month of production. 125 IBLA at 311-12. That must be the result here.

Peabody asserts that the parties to the December 1987 settlement intended to waive the requirement to pay late payment charges for additional royalties due on Navajo JU Lease 9910. It deduces that this was the "obvious intent" of the parties based upon its view that the settlement was designed to resolve not only its appeal from BIA's June 1984 notice, increasing the royalty rate for Navajo Lease 8580, but also the question of the appropriate rate for Navajo JU Lease 9910. (SOR at 35; see id. at 104-11.) Peabody thus asserts that the December 1987 settlement and resulting amendments of the two leases

> clearly provide that Peabody was making certain payments to the Navajo and entering into certain agreements with the Navajo on the condition that the 1987 Amendments to Navajo Lease 8580 [and] Navajo JU Lease 9910 * * * represented a full and final settlement of "all disputes between the parties" relating to past royalty payments and that as part of that settlement, there would be a waiver by the Navajo of any claim for late payment charges (interest).

Id. at 110 (emphasis added).

We find no evidence supporting Peabody's assertion that the settlement agreement affected Peabody's responsibilities under Navajo JU Lease 9910. We find no evidence suggesting that the parties to the December 1987 settlement intended that Peabody would not pay additional royalties on Navajo JU Lease 9910. Nor can we assume that the silence of the parties on this matter establishes that this was their intent. The questions of Peabody's obligation to pay additional royalties and late payment charges as to additional royalties owing for past production from Navajo JU Lease 9910, although it stemmed from the requirement to pay additional royalties on Navajo Lease 8580, were different matters that should have been specifically addressed in the settlement. They were not.

However, Peabody was not notified of the increase in the royalty rate on Navajo Lease 8580 until BIA issued its June 1984 notice. Because of that, the District Court reversed the Department's decision requirement to the extent that late payment charges were assessed for additional royalties owed prior to June 18, 1984. Peabody Western Coal Co. v. Babbitt, supra at 15-18. Thus, it cannot later be held liable for having failed to pay such royalties timely. See Peabody Coal Co., 72 IBLA at 339-40, 348; Atlantic Richfield Co., 21 IBLA at 101 n.1, 102-04, 108, 111, 82 I.D. at 317 n.1, 317-18, 320-21, 322. Because we agree with the Federal court's holding in Peabody Western, we similarly reverse the Acting Deputy Commissioner's April 1997 decision, to the extent that it affirmed MMS' requirement to pay late payment charges for additional royalties owed for

coal produced and sold from Navajo JU Lease 9910, for the period from February through May 1984.

Otherwise, we agree with MMS that the additional royalties became due and payable, under Navajo JU Lease 9910, each succeeding month following the month of production, starting in June 1984. Thus the payment made in January 1988 was late for coal produced and sold from that lease from June 1984 through November 1987. MMS properly required the payment of late payment charges under 30 C.F.R. § 218.202 (1987).

Except to the extent expressly addressed in this decision, all errors of fact or law asserted by Peabody have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed in part and reversed in part.

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David L. Hughes
Administrative Judge

I concur:

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T. Britt Price
Administrative Judge

IBLA 97-572	:	MMS-93-0724-IND
	:	
PEABODY COAL CO.	:	Coal Lease Royalty
	:	
	:	155 IBLA 83 (2001)

ERRATUM

The decision in the above-captioned matter, Peabody Coal Co., 155 IBLA 83 (2001), contains an incorrect citation that appeared in the quoted text of the District Court's September 3, 1999, memorandum and order in Peabody Western Coal Co. v. Babbitt, CIV No. 98-0023 PCT EHC. Thus, the text in the second quoted paragraph appearing at the bottom of 155 IBLA 90 should have stated as follows:

> Assessments for late payments are not meant to penalize the lessee, but rather are intended to compensate the lessor for the time value of money owed but not paid. Coastal Oil and Gas Corp., 108 IBLA 62, 67 (1989); Peabody Coal Co./Hopi Tribe, 72 IBLA 337, 348 (1983); Atlantic Richfield Co., 21 IBLA [98, 108, 82 I.D. 316 (1975).]

The amended text appears in brackets at the end of the paragraph.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is amended accordingly.

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David L. Hughes

Administrative Judge

I concur:

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T. Britt Price

Administrative Judge